

4-1-2007

Card-checks and Neutrality Agreements: How Hotel Unions Staged a Comeback in 2006

David Sherwyn J.D.

Cornell University, dss18@cornell.edu

Zev J. Eigen J.D.

Follow this and additional works at: <http://scholarship.sha.cornell.edu/chrpubs>



Part of the [Hospitality Administration and Management Commons](#)

Recommended Citation

Sherwyn, D., & Eigen, Z. J. (2007). Card-checks and neutrality agreements: How hotel unions staged a comeback in 2006 [*Electronic article*]. *Cornell Hospitality Report*, 7(6), 6-19.

This Article is brought to you for free and open access by the The Center for Hospitality Research (CHR) at The Scholarly Commons. It has been accepted for inclusion in Center for Hospitality Research Publications by an authorized administrator of The Scholarly Commons. For more information, please contact hlmdigital@cornell.edu.

Card-checks and Neutrality Agreements: How Hotel Unions Staged a Comeback in 2006

Abstract

Summer 2006 saw multiple negotiations between the big-city hotel operators and UNITE HERE, the union that represents hotel employees. The negotiations represented the culmination of the union's carefully set strategy to reconfigure the playing field in hotel labor relations. By arranging to have several cities' contracts expire within weeks of each other in summer 2006 and then splitting off one chain from another, the union was able to achieve its goal of selling labor peace through the threat of labor unrest. Operators in San Francisco tested the union's resolve in 2004, and the result then was a season of strikes and lockouts. Rather than endure the same scenario, operators in several other large cities negotiated for, and achieved, labor peace. While neither side is confirming the presence of neutrality and card-check agreements as part of the settlement, one of the union's stated goals was to be able to organize through the card-checks, rather than conduct secret-ballot elections. Under a card-check agreement, an employer agrees to recognize the union as its employees' representative after a majority of employees have signed cards stating that they are interested in organizing. The agreement eliminates what has traditionally been the next step, which is a secret-ballot election. Negotiations are not the only means by which unions are seeking to achieve this card-check procedure. The U.S. House of Representatives in early 2007 passed a bill that would mandate card-checks in all union campaigns. While the outlook for this bill is dim under the current administration, its fate may be determined in the 2008 election.

Keywords

hotel, unions, labor relations, organized labor

Disciplines

Business | Hospitality Administration and Management

Comments

Required Publisher Statement

© [Cornell University](http://www.cornell.edu). This report may not be reproduced or distributed without the express permission of the publisher

The Center for Hospitality Research

Hospitality Leadership Through Learning

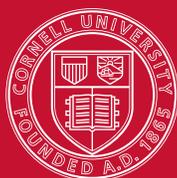


Cornell Hospitality Report

Card-checks and Neutrality Agreements: How Hotel Unions Staged a Comeback in 2006

by David Sherwyn, J.D., and Zev J. Eigen, J.D.

Vol. 7, No 6, April 2007



Cornell University
School of Hotel Administration

Advisory Board

James C. Allen, *Executive Vice President, Wines,*
Southern Wine and Spirits of New York

Scott Berman, *U.S. Advisory Leader, Hospitality and*
Leisure Practice, PricewaterhouseCoopers

Raymond Bickson, *Managing Director and Chief*
Executive Officer,
Taj Group of Hotels, Resorts, and Palaces

Scott Brodows, *Chief Operating Officer,*
SynXis Corporation

Paul Brown, *President,*
Expedia, Inc., Partner Services Group, and
President, Expedia North America

Linda Canina, Ph.D., *Associate Professor and*
Editor of Cornell Hotel and Restaurant Administration
Quarterly, Cornell University

Raj Chandnani, *Director of Strategic Planning,*
Wimberly Allison Tong & Goo

Joel M. Eisemann, *Executive Vice President, Owner*
and Franchise Services, Marriott International, Inc.

Cathy A.ENZ, Ph.D., *Associate Dean for Industry*
Research and Affairs, and Louis G. Schaeneman,
Jr., Professor of Innovation and Dynamic
Management, Cornell University

Kevin Fitzpatrick, *President,*
AIG Global Real Estate Investment Corp.

Jeffrey A. Horwitz, *Co-Chair, Lodging and Gaming*
Practice of Proskauer Rose LLP

Unmesh Joshi, *Chairman and Managing Director,*
Kohinoor Group

Jo-Anne Kruse, *EVP Human Resources,* Travelport

Mark V. Lomanno, *President,* Smith Travel Research

Suzanne R. Mellen, *Managing Director,*
HVS International

Shane O'Flaherty, *VP of Quality Assurance,*
Mobil Travel Guide

Leland C. Pillsbury, *Chairman and CEO,*
The Thayer Group of Companies

Janice L. Schnabel, *Managing Director,*
Marsh's Hospitality Practice

Judy A. Siguaw, D.B.A., *Dean,*
Cornell-Nanyang Institute

Barbara Talbott, Ph.D., *EVP Marketing,*
Four Seasons Hotels and Resorts

Elaine R. Wedral, Ph.D., *President,* Nestlé R&D
Center and Nestlé PTC New Milford



The Robert A. and Jan M. Beck Center at Cornell University
Back cover photo by permission of *The Cornellian* and Jeff Wang.

CHR Reports,
Volume 7, No. 6 (April 2007)
Single copy price US\$50
© 2007 Cornell University

CHR Reports are produced for the benefit
of the hospitality industry by The Center for
Hospitality Research at Cornell University

David S. Sherwyn, *Academic Director*
Glenn Withiam, *Director of Publications*
Jennifer Macera, *Manager of Operations*

Center for Hospitality Research
Cornell University
School of Hotel Administration
537 Statler Hall
Ithaca, NY 14853

Phone: 607-255-9780

Fax: 607-254-2292

www.chr.cornell.edu

The Center for Hospitality Research

Hospitality Leadership Through Learning

Thank you to our generous Corporate Members

Senior Partners

JohnsonDiversey

Southern Wine and Spirits of New York

Taj Hotels Resorts Palaces

Partners

AIQ Global Real Estate Investment

Denihan Hospitality Group

Expedia, Inc.

Four Seasons Hotels and Resorts

HVS International

Kohinoor Group

Marriott International, Inc.

Marsh's Hospitality Practice

Mobil Travel Guide

Nestlé

PricewaterhouseCoopers

Proskauer Rose LLP

Smith Travel Research

SynXis, a Sabre Holdings Company

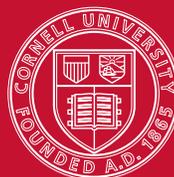
Thayer Group of Companies

Travelport

Wimberly Allison Tong & Goo

Friends

Caribbean Hotel Restaurant Buyer's Guide • Cody Kramer Imports • Cruise Industry News • DK Shifflet & Associates • ehotelier.com • Estrela Marketing Solutions • Fireman's Fund • 4Hoteliers.com • Gerencia de Hoteles & Restaurantes • Global Hospitality Resources • Hospitality Confections • Hospitality Financial and Technological Professionals • hospitalityInside.com • hospitalitynet.org • Hotel Asia Pacific • Hotel China • HotelExecutive.com • Hotel Interactive • Hotel Resource • International CHRIE • International Hotel and Restaurant Association • International Hotel Conference • iPerceptions • KPMG Japan/Global Management Directions • Lodging Hospitality • Lodging Magazine • PKF Hospitality Research • Resort+Recreation Magazine • The Resort Trades • RestaurantEdge.com • Shibata Publishing Co. • The Lodging Conference • TravelCLICK • UniFocus • WageWatch, Inc. • WIIH.COM



Cornell University
School of Hotel Administration

Card-checks and Neutrality Agreements:

How Hotel Unions Staged a Comeback in 2006

By David Sherwyn and Zev J. Eigen

ABOUT THE AUTHORS



David Sherwyn, J.D., is associate professor of law at the Cornell University School of Hotel Administration (dss18@cornell.edu). His primary research focus is labor and employment law issues relevant to the hospitality industry; specifically, mandatory arbitration of discrimination lawsuits and sexual harassment. Among his publications are articles in the *Stanford Law Review*, *Berkeley Journal of Employment and Labor Law*, the *Fordham Law Review*, the *University of Pennsylvania Journal of Labor and Employment Law*, and the *Cornell Hotel and Restaurant Administration Quarterly*.

A teaching fellow at Harvard Law School, **Zev J. Eigen**, J.D., is a Ph.D. candidate at the Sloan School of Business at Massachusetts Institute of Technology (zeveigen@MIT.EDU). Among other publications, his work has appeared in the *Cornell Hotel and Restaurant Administration Quarterly*, the *Fordham Law Review*, and the *University of Pennsylvania Journal of Labor and Employment Law*.



EXECUTIVE SUMMARY

Summer 2006 saw multiple negotiations between the big-city hotel operators and UNITE HERE, the union that represents hotel employees. The negotiations represented the culmination of the union's carefully set strategy to reconfigure the playing field in hotel labor relations. By arranging to have several cities' contracts expire within weeks of each other in summer 2006 and then splitting off one chain from another, the union was able to achieve its goal of selling labor peace through the threat of labor unrest. Operators in San Francisco tested the union's resolve in 2004, and the result then was a season of strikes and lockouts. Rather than endure the same scenario, operators in several other large cities negotiated for, and achieved, labor peace. While neither side is confirming the presence of neutrality and card-check agreements as part of the settlement, one of the union's stated goals was to be able to organize through the card-checks, rather than conduct secret-ballot elections. Under a card-check agreement, an employer agrees to recognize the union as its employees' representative after a majority of employees have signed cards stating that they are interested in organizing. The agreement eliminates what has traditionally been the next step, which is a secret-ballot election. Negotiations are not the only means by which unions are seeking to achieve this card-check procedure. The U.S. House of Representatives in early 2007 passed a bill that would mandate card-checks in all union campaigns. While the outlook for this bill is dim under the current administration, its fate may be determined in the 2008 election.

Card-checks and Neutrality Agreements:

How Hotel Unions Staged a Comeback in 2006

By David Sherwyn and Zev J. Eigen

Have the reports of the death of organized labor in America been—to borrow from Mark Twain—greatly exaggerated? The signs are that the labor movement is still alive, at least in the hotel industry. The first sign of this resurrection may be found in the hotel industry’s summer 2006 negotiations. As we explain in this article, the chances are good that these negotiations will likely be regarded as the most important set of negotiations that the hotel industry ever faced. The second sign could be the passage by United States House of Representatives of the “Employee Free Choice Act” in March 2007. If enacted, that legislation would allow employees to organize using authorization cards instead of secret-ballot elections, and would require unions and employers who could not agree on a first contract to have the terms and conditions of employment decided by an arbitrator.

In this report we examine the both the Employee Free Choice Act and the summer 2006 negotiations. With regard to the 2006 negotiations, we explain how summer 2006 was set up to be a watershed time for the union movement, what the issues were, and how the negotiations were resolved. We then examine the Free Choice Act by discussing its provisions, its effects, and employers' potential reactions to it. Before discussing the 2006 negotiations and the Free Choice Act, however, we'll review the state of the labor movement and the merger that created UNITE HERE, which seeks to represent workers in the hotel industry.

The State of the Labor Movement and the Merger of UNITE HERE

The once-strong union movement has experienced a lengthy decline in the United States. In the years following World War II, the U.S. economy boomed and the labor movement attained its peak of national power. Unions organized more than half of the work force in manufacturing.¹ At its height in the mid 1950s, organized labor represented about 35 percent of the United States' workforce.² That percentage has declined steadily since that time, to 13.7 percent in 2005. In the private sector today, only 7.8 percent of the workforce is unionized, which is the approximate level just before the New Deal, in the 1930s.³

For many years, the hotel workers were not a particular focus of the labor movement. Traditionally, hotel employees were not highly paid, often worked for tips, and did not stay in bargaining-unit positions for the duration of their careers. Since union dues are composed of a percentage of employee pay (excluding tips) and because union members who benefit the most are those who stay at the same job for long periods of time, a hotel was not the model employer on which the union movement would theoretically wish to concentrate its efforts. Instead, the union movement focused on "heavy labor," the skilled and semi-skilled employees of America's factories.⁴

In the 1940s and '50s, the United States was the dominant world producer of heavy manufactured items such as

¹ B.E. Kaufman, *The Origins and Evolution of the Field of Industrial Relations in the United States* (Ithaca, NY, ILR Press, (1993).

² *Ibid.*, p. 46.

³ B.T. Hirsch, and A.D. Macpherson, "Union Membership and Coverage Database from the Current Population Survey" (2004). The union membership and coverage Database from the CPS is updated on the web at www.unionstats.com/, where the updated statistics of Hirsch and Macpherson's work may be found here. See also: www.bls.gov/news.release/union2.t03.htm

⁴ *Ibid.*

automobiles and steel, as well as "lighter" manufacturing, including textiles. These industries, situated for the most part in the northeast and the midwest, were heavily unionized.⁵ The energy needed to run the plants came from union-organized coal mines, while the truck drivers and the longshoremen who moved the products were usually union members. As most of us now know, the days of American dominance in manufacturing are long gone. Overall, employment in U.S. manufacturing industries fell by 1.8 million jobs between January 1997 and December 2001. A disproportionate share of those lost jobs were concentrated among union members—with organized labor losing nearly 10 percent of its manufacturing-sector membership in that short five-year period.⁶ The decline of the American manufacturing is reflected in the union membership statistics.⁷ It is beyond the scope of this paper to attempt to explain the shift from manufacturing to services in the United States economy, but many scholars attribute some of the shift to globalization. Whereas global trade amounted to approximately one-third of the total world output in the early 1970s, it approached 45 percent in 1995.⁸ There has been a 150-percent growth in foreign trade from 1970 to 1997.⁹

Pressure of the global economy has caused domestic businesses of all types to seek lower labor costs abroad, and technological innovation has enabled even service-based businesses to employ labor abroad, notably, in India. According to India's National Association of Software and Service Companies, employment of software developers and call-center operators serving clients outside of India increased by 353,000 between 2000 and 2004, reaching 505,000. Seventy percent of those workers served clients in the United States.¹⁰ This is an example of what has happened in many sectors.

With the decline in manufacturing, the relevance of the hospitality industry to organized labor grew. Indeed, most of the "great hotels" in large American cities are organized, including nearly all of New York's large, prestigious hotels. A

⁵ *Ibid.*

⁶ Kate Bronfenbrenner and R. Hickey, "Winning Is Possible: Successful Union Organizing in the United States—Clear Lessons, Too Few Examples," *Multinational Monitor*, Vol. 34, No. 6 (2003).

⁷ P.T. Osterman, and A. Kochan *et al.*, *Working in America: A Blueprint for the New Labor Market* (Cambridge, MA: MIT Press, 2001).

⁸ Hirsch and Macpherson, p. 62.

⁹ G. Garrett, "Globalization and Government Spending around the World," *Studies in Comparative and International Development*, Vol. 35, No. 4 (2001).

¹⁰ Jagdish Bhagwati, A. Panagariya and T.N. Srinivasan, "The Muddles over Outsourcing," *Journal of Economic Perspectives* (forthcoming, 2006).

strong union presence is also found in Boston, Chicago, Los Angeles, San Francisco, and Washington, D.C. Needless to say, hotels constitute one of the few industries that cannot be relocated or outsourced overseas. Since the jobs are staying put, the hospitality industry is now not only a focus, but could be the holy grail for the future of the labor movement. There had been a problem confronting the labor movement in this endeavor, however, and that was inadequate resources.

The Hotel Employees and Restaurant Employees (HERE) had a core membership in a growth industry. Moreover, the union had a bright, dynamic, and progressive leader, John Wilhelm. But HERE lacked resources; the union simply did not have a lot of money. Meanwhile, UNITE, the successor union of the International Ladies' Garment Workers' Union (ILGWU) and the Amalgamated Clothing and Textile Workers Union (ACTWU), also had a bright, dynamic, and progressive leader, Bruce Raynor. In addition, because it owned the Amalgamated Bank of New York, it had substantial resources. The problem for UNITE was declining membership, because it was focused on the rapidly shrinking apparel and textile manufacturing industry.

On July 8, 2004, UNITE and HERE solved their problems by merging and creating UNITE HERE. From its inception, UNITE HERE made its priorities clear. The union's web site states: "Organizing the unorganized in our industries is the top priority for UNITE HERE. Over 50 percent of the new union's national budget will go toward organizing."¹¹ UNITE HERE does not, however, wish to organize the "old fashioned way" through NLRB elections. Instead, the union wishes to increase its membership via neutrality agreements and card checks. To understand the distinction, both types of union organizing are explained below.

"Unite to Win" Organizing Strategy

UNITE HERE is one of a group of national labor organizations engaged in a novel attempt to shift strategic gears, in particular with respect to organizing. In addition to UNITE HERE, the unions are the largest and arguably most powerful unions in the U.S.: the Service Employees International

¹¹ www.unitehere.org/ visited on _____, 2006.

Union (SEIU), the International Brotherhood of Teamsters, the Carpenters, United Farm Workers, the Laborers International Union, and the United Food and Commercial Workers (UFCW). As stated on the "Change to Win" website, which is the seven unions' collective electronic effort, the central objective of "Change to Win" is "to unite the more than 50 million American workers who work in industries that cannot be outsourced or shipped overseas into strong unions that can "win them a place in the American middle class—where their jobs provide good wages, good health care, good pensions, and a voice on the job."¹² The goal is for the Change to Win unions to integrate their organizing programs ("Unite to Win" is UNITE HERE's name for its part in "Change to Win") and to launch large-scale organizing campaigns.

Part of the organizing strategy involves labor-coalition building with the intent of bypassing traditional organizing drives (described below) in favor of applying political and economic pressure on employers to gain alternative means of access to unorganized employees. John Wilhelm explains this concept on the Change to Win website, as follows: "what workers in this industry need, what the country needs is a permanent campaign to do in the service sector what we did in manufacturing 70 years ago: transform low-wage work into decent jobs that give people the opportunity to make it into the middle class." These unions seek to accomplish this goal via the non-traditional organizing methods of card-checks and neutrality agreements, described in greater detail below. Indeed at a recent Change to Win convention held in Las Vegas, attended by over 2,000 union organizers, the union announced an organizing campaign in 35 cities. Operating under the slogan, "Make Work Pay," the organizing drive is unique in that it aims to form cooperative cross-union efforts to organize workers in the target cities. One of the primary components of the "Make Work Pay" campaign is a national campaign led by UNITE HERE to organize workers at a large U.S. hotel chain, including massive leafletting effort at the company's hotels and community rallies in many cities.

¹² www.changetowin.org/

With both resources and motivation, UNITE HERE is focused on organizing hotel workers.

Traditional Organizing Drives

The typical organizing approach under the “old fashioned method” involves selecting a target company, assessing employees’ interest in organizing, identifying the issues that concern employees, and then contacting the employees. Sometimes the contact comes in the form of a “blitz” as the union bombards the employees with information. Other times, the union slowly builds support. In rarer situations, unions send their members to apply for jobs in a Trojan horse technique. The applicants’ real reason for applying for work is to gain access to other employees. This method, referred to as “salting” has been the subject of a United States Supreme Court case in which the Court held that an employer could not terminate a “salter” simply because the real reason the employee joined the company was to organize it.¹³ Another method for organizing is to enter the property and hand out authorization cards (referred to as “hand billing”) or set up picket lines at the entrances and exits to the property. All of these approaches are called traditional methods because the culmination of each one is a government-monitored election.

The National Labor Relations Act (NLRA) sets forth the laws regulating this form of employee organization.¹⁴ Under those rules, before any labor organization can be certified as the exclusive bargaining representative for any group of employees, the employees in that group, called a bargaining unit, vote for or against union representation in a secret-ballot election monitored by the National Labor Relations Board (NLRB). In most cases the NLRB seeks to schedule such an election approximately four weeks after the union initiates the process by filing a representation petition. The time period may be extended if the employer contests the bargaining unit or if other related issues arise. Regardless, the four-week period provides the union and the employer with an opportunity to present their positions to the employees.

¹³ *N.L.R.B. v. Town & Country Elec. Inc.*, 516 U.S. 85 (1995).

¹⁴ See: www.nlr.gov/nlr/legal/manuals/rules/act.asp for the full text of the NLRA.

Under the NLRB rules, a union may request the secret-ballot election only if a minimum of 30 percent of the employees in an appropriate bargaining unit have signed authorization cards. As a practical matter, however, most national unions will not file a petition unless at least 60 percent of the employees have signed cards.¹⁵ To prevail in the election, the union needs a simple majority only of those who actually vote, not a majority of those who would be represented in the bargaining unit. Thus, if 50 employees are in the proposed bargaining unit but only 21 vote, the union needs only 11 votes to win. Employers win in the event of a tie.

Both sides are free to “campaign” prior to the election. Indeed, the period between the time the petition is filed and the election is held is often referred to as the “campaign period.” The law prohibits employers from using certain tactics to attempt to swing the election. Employers may not threaten, interrogate, make promises to, or engage in surveillance of employees. In addition, employers may not solicit grievances or confer benefits. If the employer violates these rules, the NLRB may either order the election to be rerun or issue a bargaining order.¹⁶ Employers may, however, engage in numerous legitimate campaign activities to convince employees to vote against the union.

This is exactly what employers typically do during the campaign period: they raise a number of issues with the intent of informing employees of their rights and the consequences of voting in favor of the union.¹⁷ According to man-

¹⁵ Interview with Richard Hurd, professor of labor relations, Cornell University School of Industrial and Labor Relations, June 28, 2001. The estimate is intended to be conservative, based on conversations with union officials over the past seven years. Some assert that the percentage of employees the union considers supporters (based on authorization card signatures) is between 75 and 90 percent.

¹⁶ A bargaining order is an NLRB mandate requiring a company to “cease and desist from their unfair labor practices, to offer reinstatement and back pay to the employees who had been discriminatorily discharged, to bargain with the union on request, and to post the appropriate notices.” *National Labor Relations Board v. Gissel Packing Co.*, 395 U.S. 575, 585 (1969).

¹⁷ Employers typically raise some or all of the following issues: Whether unions can “guarantee” increased pay, benefits, or anything else;

UNITE HERE's strategy is to organize using card-check neutrality agreements, rather than use traditional secret ballots.

agement side labor lawyers, one of the key strategies in this regard is to examine what the union is selling and explain to the employees ways in which the costs outweigh the benefits. This is why, employers argue, companies are able to defeat unions in elections.¹⁸ Not surprisingly, unions often embody a different view of campaigns.

Union advocates claim that during most campaigns employers illegally threaten, intimidate, and terminate employees who favor the union. According to a 2005 report by the University of Illinois at Chicago's Center for Urban Economic Development, when faced with organizing drives, 30 percent of employers fire pro-union workers, 49 percent threaten to close a work site if the union prevails, and 51 percent coerce workers into opposing unions with bribery or favoritism.¹⁹ Unions point to the numerous unfair labor practice charges filed against employers as well as anecdotal evidence of outrageous employer behavior.²⁰

How collective bargaining operates; What happens when strikes are called or picketing is conducted; Union dues and initiation fees; Where union fees go, how the money is used, and by whom; Whether the union's leaders are trustworthy and capable; The employer's record of responsiveness to employee issues; The fact that employees will be paying someone to do what they may have been able to do for free (i.e., represent themselves); Whether the organizing drive has actually been beneficial in the sense that it has called attention to problems that need to be addressed whether the union is there or not; and Whether the employer should make management changes (because an organizing drive seems to have been triggered by a perceived lack of leadership).

¹⁸ Surveys of union organizers and employees who have been through NLRB election campaigns seem to confirm this trend at least indirectly. See, for example.: American Rights at Work survey (2006), and survey reported by Bronfenbrenner and Hickey, *op.cit.*

¹⁹ www.americanrightsatwork.org/press/press.cfm?pressReleaseID=33

²⁰ A paper forthcoming in *ILR Review* models the fate of unions in elections. This paper models three stages of the union organizing drive, using a new dataset on more than 22,000 drives between 1999 and 2004. The sequential model tracks drives through holding an election, winning an election and reaching first contracts. Only one fifth of organizing drives that filed an election petition with the NLRB managed to reach a first contract. An unfair labor practice charge is associated with a 58-percent smaller cumulative chance of reaching such a contract. ULP charges primarily affect the decision to hold an election and the ability to reach a first contract, rather than the votes cast. A sequential model such as this

Regardless of whether employers violate the law by intimidating and threatening employees or unions have nothing to sell, one thing is clear: UNITE HERE no longer wishes to organize under the traditional NLRB election rules. In fact, as one HERE organizer stated: "[W]e will never go to an NLRB election again."²¹ Instead, as part of the above-described "Unite to Win" coalition, UNITE HERE's strategy is to organize using card-check neutrality agreements.

Neutrality Agreements

Although neutrality agreements come in several forms, the common denominator for all of them is that employers agree to stay neutral with regard to the union's attempt to organize the workforce.²² Some agreements simply state that the employer will remain neutral with no other language, while other agreements contain more specific provisions.²³ For example, UNITE HERE's standard agreements clearly state that employers "will not communicate opposition" to the union's efforts.²⁴

Neutrality agreements commonly provide the union with access to employees in the form of a list of their names

one could be extended to test between some competing theories about the determinants of union organizing. See: John-Paul Ferguson, "The Eyes of a Needle: A Sequential Model of Union Organizing Drives, 1999–2004), *ILR Review* (forthcoming), MIT-IWER working paper.

²¹ Michael Hughlett, "Hotel Worker's Union in St. Paul Minn., Plans New Tack in Organizing," *Hotel Online*, www.hotel-online.com/neo/news/2001_June_22/k.SPH.993243589.html, June 20, 2001 (quoting Jaye Rykuny, head of H.E.R.E. Local 17).

²² While most agreements define neutrality, the definitions vary widely. Most H.E.R.E. agreements prohibit the employer from communicating any opposition to the union. Less-typical definitions declare that management will make an affirmative statement to their employees that it welcomes their choice of a representative. See: Eaton and Kreisky, pp. 8–9.

²³ Agreements may state that (1) the employer will not attack or demean the union; (2) the employer will not refer to the union as a third party; (3) the parties will strive to create a campaign free of fear, hostility, and coercion; (4) the parties will campaign in a positive manner; (5) the parties will keep their statements pro-company or pro-union; and (6) the employer will not state that it is corporate policy to avoid unionization. See: Eaton and Kreisky, p. 9.

²⁴ Eaton, p. 8.

and addresses (and, sometimes, telephone numbers), as well as permission to come onto company property during work hours for the purpose of collecting signed authorization cards. This provision diverges from the guidelines set up by the NLRB and the courts, under which an employer has no obligation to provide the union with such sweeping access to its employees, and may actually be prohibited from doing so.²⁵

Finally, most neutrality agreements also include a “card check” provision, which requires the employer to recognize the union if a majority of the bargaining-unit employees sign authorization cards. Under a card-check agreement, the employees never have the prospect of a secret-ballot election monitored by the NLRB. Instead, the employer recognizes the union if it presents the company with the requisite number of signed authorization cards, at which point the neutrality agreement is no longer needed and expires.

The Effect of Neutrality Agreements

Needless to say, neutrality agreements radically change the landscape of union organizing. One study conducted in the late 1990s examined 170 private-sector “union campaigns” in which the employer and the union agreed to neutrality with a card-check provision. With the aid of such agreements, the union prevailed in 78.2 percent of those 170 campaigns.²⁶ In contrast, the unions’ success rate in contested NLRB elections during the same time period was 46 percent. Noting the difference of better than 30 percentage points, the authors then considered the public sector, where unions won 85 percent of the elections in 1995. With that comparison, the authors downplayed the effects of the neutrality agreements with card checks.

Given the reality that no union will petition for an election unless they have well over 50-percent support of the prospective bargaining unit, one can infer that when a union loses an election it once had majority support, but

lost that majority by the time of the vote. This occurred in 54 percent of the cases in the study above. In contrast, if those votes had been replaced by a card-check agreement the unions would likely have been recognized.

A hypothetical example shows how this calculus applies. Assume that there are 200 employers targeted by the same union. One hundred employers sign a neutrality agreement with a card-check and 100 do not. Based on the above study’s results, the union organizes 78 of the 100 neutrality employers. The union then attempts to organize 100 employers without neutrality agreements. Of these 100 companies, the employees in 20 companies do not want a union. Because under 50 percent of the employees sign authorization cards, the union walks away from those 20 firms.

Let’s compare the union’s fate under a card check and under an election with the 80 firms where the union gets more than 50 percent of the employees to sign cards. Under a card-check agreement, all 80 of these companies would be unionized as soon as a majority of employees sign their cards. In contrast, when we apply the NLRB’s statistics to an election for those 80 firms, the union prevails in less than 40 of the elections.

If one applies the authors’ approach from the above study to these hypothetical numbers, one could report the results as follows. First, a neutrality agreement with a card check yielded a 78-percent union recognition. Second, election yielded a just under a 50-percent union success rate. That conclusion, however, omits the 20 companies where the union walked away. Thus, the union’s success rate using elections would be no better than 40 percent with this example.

What this means for managers is the following. Assume there is enough employee interest to warrant an election. If there is an election, the company’s chances of becoming unionized are less than 50 percent. Alternatively, if there is a neutrality agreement with a card-check provision unionization is for all intents and purposes guaranteed. Given the above results, it seems clear that employers who want to remain non-union, or simply believe that employees should hear both sides of the argument and then vote, should refuse to sign a neutrality agreement.

²⁵ *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). See also: *Phelps Dodge Corp.*, 177 NLRB 531 (1969).

²⁶ Eaton, p. 15.

Why Sign?

The analysis above leads to the obvious question of why an employer would ever accede to a neutrality agreement in the first place. The short answer to this question is that the employer will sign a neutrality agreement when it believes that signing an agreement is in its best interest. Observers who believe that unionization is never in the employer's best interest would likely be puzzled by this statement, but signing a neutrality agreement is, in fact, in the employer's best interest in some situations. One example occurs in some municipalities that have instituted labor-peace agreements which required neutrality for employers that wish to obtain building permits or even to operate in the jurisdiction.²⁷ As another example, it is not unheard of for a union to buy a hotel and make a neutrality agreement a condition for any operator wishing to manage that property. Finally, an employer might sign a neutrality agreement because the union is selling something that the employer wishes to buy. That may include the union's assistance in staffing a property or in simply helping clear the way to open. For example, in Las Vegas, at least one HR director contends he could have never opened on time without the help of the union.

Perhaps the greatest bargaining chip that unions have to offer an employer in exchange for neutrality is labor peace. To sell peace, though, the union needs the ability to create unrest. In the last several years, UNITE HERE has forged a strategy that will allow it to create unrest for the hotel industry to afford it the opportunity to peddle peace. The union had the ability to employ this tactic in summer 2006.

Summer 2006

Most of the unionized hotels in the major cities in the United States and Canada are part of an employers' association that bargains as a multi-employer group. The contract

²⁷ See: *Aeroground, Inc. v. City and County of San Francisco*, N.D. Cal., No. C-01-1628VRW, injunction granted 7/9/01. San Francisco established a labor-peace rule that required any employer that leased, subleased, contracted, or subcontracted with SFO to agree to a card-check authorization procedure with any union that initiated a representation request. The union had to register with the airport director also.

that emerges from these negotiations is referred to as an area agreement and covers all the properties in the association. In addition, some properties that are not part of the multi-employer group sign what are referred to as "me-too agreements." These agreements simply mean that these non-associated properties will be bound by the area agreement.

Traditionally, the contracts in the major cities expired in different years, because HERE did not have the resources to negotiate on several fronts at the same time. Likewise, the hotel companies found it too cumbersome to juggle multiple negotiations for their properties in several cities simultaneously. Thus, both sides were agreeable to have the contracts for each market expire in successive years.

For the most recent set of negotiations, though, UNITE HERE changed its strategy. This time around, it sought to have the contracts in a number of large cities expire in the same year. UNITE HERE did not, of course, announce this strategy. Instead, it simply worked intelligently and diligently to implement its plan. For example, in spring 2000 the union and the New York employer's association extended to 2006 their contract, which had been set to expire in 2001. Then, in 2003, the union and the associations in Chicago and Boston signed three-year contracts. In 2004 UNITE and HERE merged and their leaders made it clear that negotiations in summer 2006 would be different. Next, by agreeing to short contracts, or no contracts at all, the union made sure that in addition to New York, Boston, and Chicago, the contracts in Honolulu, Los Angeles, San Francisco, Detroit, and Toronto had expired or were set to expire by summer 2006. The expiration dates were not, however, all identical. New York's contract expired June 30, for instance, while Chicago's expiration was August 31, and L.A.'s and Boston's agreements ended in November.

Having the contracts expire in 2006 was not completely successful nor was it without a significant amount of rancor. First, the employer association in Washington, D.C., refused to agree to a short contract. The Washington, D.C., contract, signed in 2004, expires in 2007. Similarly, the San Francisco contract expired in 2004, and the union wanted a two-year contract. When the employers refused, the union called a

Employers sign neutrality agreements when they believe it to be in their best interest—for example, to buy labor peace.

strike. In response, employers issued a lockout. Even after the work stoppages concluded, the union issued a boycott of certain unionized hotels. Consequently, there was no contract in place by summer 2006.

According to John Wilhelm, the reason for UNITE HERE's new strategy was the consolidation of the hotel industry. Many of the formerly separate management companies that operate hotels in major cities are now under common ownership (e.g., Sheraton, St. Regis, and Westin, operated by Starwood; Hilton Hotels, Embassy Suites, and Hampton Inns, operated by Hilton). Instead, Wilhelm stated that the union simply wanted to negotiate with corporate executives and not representatives from each city. He further explained that the union does not want a national labor contract or a standardized wage scale.

Having contract negotiations in several cities at once certainly may attract the attention of corporate executives, but there seems to be a more fundamental strategy at work. To begin with, Wilhelm is partially correct when he says the 60-year-old city-based bargaining structure "doesn't work anymore." The development of large chains has seriously hampered the union's threat of labor war in any given city. If New York is on strike, for instance, and hotels in that city lose convention bookings as a result, companies can withstand the loss because of revenues from business in other cities. Moreover, if convention goers were willing to cross a picket line, operators could send managers from other cities to work at the hotels on strike.

Thus, while the 60-year-old bargaining structure does not work for UNITE HERE, it worked well enough for the chain hotel operators. The old structure put the union at a serious disadvantage. The interesting question is whether the new arrangement simply levels the playing field or whether it gives the union an advantage. The answer lies in the union's other strategy, which involves neutrality agreements and card checks.

Given UNITE HERE's focus on organizing and the fact that UNITE HERE does not wish to organize with NLRB elections, the logical conclusion is that a major goal of the union strategy was to convince the hotels to sign neutrality

agreements. Since neutrality agreements are merely permissive subjects of bargaining (as opposed to mandatory subjects), UNITE HERE cannot insist that the hotels discuss this form of organizing. Instead, the union must offer something so that the employer will discuss a neutrality agreement. Typically, the union will package neutrality with lower-than-expected demands for wage and benefit increases. With that offer, hotels were faced with an option: buy peace or go to war. To get hotels to purchase peace, as I said above, a union has to make realistic its threats of labor unrest.

To embark on that approach, the union first needed to ensure that it had the financial resources and the member support to strike. The union worked hard to achieve both of these goals. For example, in June 2004 the union's New York leadership proposed that members agree to payroll deductions of \$10 per week to create a strike fund. The membership overwhelmingly agreed, and by the time the New York contract expired in 2006 the union had accumulated \$26 million. The union also did a masterful job of getting its members to buy into the necessity of the cause. For example, speaking to the Hotel Trades Council's 2006 Contract Convention on June 10, 2004, Bruce Raynor told his audience: "You and your members are about to become members of the biggest and baddest union on the planet!" He then put out a warning to the multinational hotel companies: "You fight one of us, you'll fight all 500,000 of us." John Wilhelm expressed similar sentiments when he told the council: "You don't permit the hotels to divide you by job, by hotel, by race, by age, or by any other factor, and you're not going to let them divide you by city. In fact, in 2006 you are going to divide and conquer them!"

Divide and conquer was exactly what the union did. From the time it began its plan to have numerous contracts expire during the same summer, UNITE HERE's strategy was clear: begin corporate campaigns. Instead of negotiating against one employer association with numerous properties, UNITE HERE set up a system where it negotiated against one operator with hotels throughout the country. The union then set up an "us vs. them" strategy. Smaller operators were encouraged to not get involved in negotiations, not to sup-

UNITE HERE used a “divide and conquer” strategy to split apart city hotel associations and divide owners from operators.

port the other operators, and, instead, to agree to sign “me too” agreements. The November 1, 2005, issue of *Hotel Voice* contained the following quote: “The hotels that sign a “me too” agreement are the good guys. The hotels that sign the Hotel Association’s Mutual Assistance Pact are trying to pick a fight with the union and their employees.”

Mutual assistance pacts would require properties to lock out employees if any of their sister properties went out on strike. Signing a mutual assistance agreement put a hotel in line to participate in a prospective war. A me-too agreement, on the other hand, meant an employer could stay on the sideline of the potential war and simply benefit (or suffer) from the agreement negotiated by association. Most operators signed me-too agreements.

With many small operators on the sidelines, the union focused on major operators. The first major strategic decision was to attempt to split the chains. In this instance, the union exercised its right to exclude Hilton from the industry-wide bargaining agreement, based on accusations regarding Hilton’s labor record. As *NewYorkBusiness.com* reported: “The union has refused to allow Hilton hotels to join the negotiations and is demanding a separate contract from the Beverly Hills–based operator. The trades council says that Hilton has the worst employment record in terms of safety issues and back pay.”²⁸ Peter Ward, president of the New York Hotel Trade Council, explained: “Our reasons for isolating Hilton are well known. We firmly believe that a separate contract with the Hilton Corporation is necessary because of its record in dealing in bad faith with the union and with its employees. We believe we need stronger contract enforcement rights to protect our members who work for Hilton, because in the entire New York hotel industry this company has the worst record of cheating and abusing workers and violating the contract.”²⁹ Separating such a large operator from its cohorts caused unrest among the operators and forced Hilton to negotiate on its own. The employers associations were forced to decide whether to wait to see what would come out of the Hilton negotiations or to try to cut a

deal before UNITE HERE’s Hilton negotiations got messy. Moreover, regardless of the employers’ desires, the union had substantial control over the sequence of negotiations. This meant that the union could focus on Hilton and ignore the association for a period of time. For example, in New York the association and the union reached an agreement before Hilton, but the opposite occurred in Chicago.

The union’s divide and conquer strategy did not stop with operators. The union also used hotels’ distinctive ownership structure to its advantage. Since operators often do not own the hotels they manage, the interests of the owner and the operator conflict in many situations. For example, an owner of a unionized hotel has no interest in fighting for the right for new (competing) hotels to be nonunion. Indeed, the unionized owner may want the new operator to agree to a neutrality agreement to level the playing field for costs and work rules. Even owners with different goals might not form a united front, as short-term investor-owners would have a different perspective from long-term buy-and-hold owners. Just as operators dropped out of employer associations, owners soon hired their own counsel and bargained alongside their operator agents, but not always with them.

Even as operators separated from each other and owners separated from operators, the union remained united. By November the union could call or threaten to call strikes against one operator in all nine cities or even against several operators. The multiple-strike threat was viable because the union had employee support, its well financed strike fund, and strong communication. The companies knew that the employees would strike if they so chose. Any such strike would be exceedingly painful, because operators who had to endure a strike would most likely not be able to bring in members of management from other cities to substitute for strikers because all the hotels in the chain would either be on strike or preparing to go out on strike. More important, the companies knew that the me-too signatories would not support operators who were suffering from a strike. Instead, the me-too signatories would actually take the convention business that the strike-hampered hotels would be forced to turn away. To complete the “perfect storm” scenario, the ho-

²⁸ *NewYorkBusiness.com*.

²⁹ *Hotel Voice*.

tel industry was in the midst of an upswing and was finally getting over the negative business effects of 9/11. Summer 2006 was, from a financial standpoint, the best summer for hotels since the watershed year of 2000. Simply put, the operators could not let labor unrest prevent the industry from enjoying what looked to be one of its most successful summers ever. With this scenario, the union's ability to wage war allowed it to sell peace.

The union did, in fact, sell peace. Except in San Francisco, which had already endured a strike, a lockout, and a boycott in 2004, the summer 2006 negotiations resulted in no strikes, no lockouts, and no labor strife at all. Hilton, once referred to as evil, became the preferred hotel company for UNITE HERE. By the end of the year, New York, Chicago, Los Angeles, San Francisco, Honolulu, and Toronto all signed agreements. As of this writing, agreements are almost complete in Boston and Detroit. The union declared victory, an assertion with which operators, owners, and management lawyers seem to universally agree. What is not yet clear in this picture is what the union gained in exchange for the peace. While the summary of the New York agreement found on the following pages gives an overview of the economic and noneconomic agreement, it does not address the main issue of the 2006 negotiations—neutrality.

Neutrality does not appear in the New York contract, because the issue is irrelevant there. All new properties operated by any member of the association (including me-too signatories) are covered by a neutrality agreement. This is not the case in other cities, however. Media reports state that the Hilton agreement and those of the different cities provide for neutrality.

It is unlikely that the details of these agreements will ever be made public. On Tuesday, March 6, 2006, one of the authors moderated a panel that examined the summer 2006 negotiations at the First Annual HR in Hospitality Conference and Expo in Las Vegas (of which Cornell's Center for Hospitality Research was a cosponsor). The panel consisted of three management lawyers who represented various owners, operators, and associations during the 2006 negotiations (namely, Proskauer Rose's Bob Batterman; Kane Kessler's

David Rothfeld; and Franzcech, Sullivan's Jim Zuehl), along with the union's John Wilhelm. He was directly asked the following question: "John, will we ever see the neutrality agreement from the 2006 negotiations?" John answered, "no." That said, it seems clear that the union achieved most of its goals, and that card-check neutrality is now a fact of life for many properties throughout the country.

Next, we examine whether card-check neutrality agreements are lawful, and discuss the latest legislative development. In regard to these topics, we must say: stay tuned because we are in a period of flux.

Are Card Check Neutrality Agreement Lawful?

The legality of card-check agreements may hinge on the definition of a "thing of value." Section 302 of the Labor Management Relations Act prohibits unions and employers from giving each other a "thing of value." The reason for this prohibition seems clear. The drafters of the law did not want unions and employers to exchange favors so that their loyalty was to each other at the expense of the employees. While there is limited case law on what the term of "thing of value" means under Section 302, it seems that the term covers fairly minor "deals."

In *U.S. v. Schiffman*, the question before the court was whether the request for a reduced room rate constituted a thing of value and thus violated Section 302.³⁰ In that case, a union official who represented a bargaining unit at a Hyatt property in Florida requested that an Atlanta Hyatt provide the official with a room rate that was almost 50-percent less than Hyatt's corporate rate. The court found that the room-rate reduction was a "thing of value" and that the requested favor violated Section 302.

Similarly, in *U.S. v. Boffa*, the court found that an employer unlawfully provided a thing of value when it provided a union official with the use of a car without charge for a four-month period.³¹ This seemingly broad definition of "thing of value" in Section 302 is consistent with the

³⁰ 552 F.2d 1124 (5th Cir. 1977).

³¹ 688 F.2d 919, 936 (3rd Cir. 1982).

I. Term:

6 years (7/1/06 – 6/30/12)

II. Economic:**A. Wage increase percentages**

7/1/06	4%	7/1/09	3.5%
7/1/07	4%	7/1/10	3.5%
7/1/08	4%	7/1/11	3.5%

Notes: Wages increases are compounded; wage-related items increased by above percentages.

B. Pension

7/1/06 +2%

C. Health

Current 20.5-percent contribution rate is continued and 45 % liquid asset threshold is maintained.

D. Sick Days

7/1/10 + 1 day (to 8)

E. Vacation

7/1/07 20 or more years: 5 weeks

F. Porterage

For all groups booked after 7/1/06:

\$2.00 per bag in or out for bellpersons

\$1.00 per bag in or out for doorpersons

New definition of "tour"; treated as a "wage related" item

G. Bereavement

"Certified" domestic partner added to definition of "immediate family"

H. "New Employee" Hire Rates

7/1/06 75% for two years; 85% for two years

Cost: Annualized at 4.7%–4.8%

III. Non-Economic**A. Discharge, Discipline and Contract Claims; Intentional and Bad Faith Violations; and Willful Violations (new)**

Impartial Chairperson (IC) may award a 15% penalty in circumstances where the IC has awarded back pay and the IC has found that the hotel has shown a pattern of repeated violations or willfully violated a clearly defined contractual provision. This provision does not apply to situations where the IC finds that the Employer has relied upon a reasonable good faith interpretation of the Agreement.

Sunset: (new)

"Old" "non serious," discipline where employee has not received any discipline within 24 month preceding period may not be relied upon. Attendance discipline treated similarly, but separately.

Mitigation: (new)

Confined to Article 21 registration and adherence.

Spotters (new)

In cases of possible suspension or discharge:

(i) 72 hours notice to employee that he/she is subject of spotter's report

Issuance of suspension or discharge within 14 days of notification above

Spotters (continued)

Copies of any documents or other information relied upon are to be given to Union

In cases of verbal warning or written warning, issuance of same within 30 days of Employer's receipt of spotter's report

Hidden Surveillance Cameras (new)

Use permitted without prior notice to Union, upon "reasonable belief"; 60 days for such belief. Biennial notification to Union, retention of tapes

Delegates and Assistant Delegates:

(i) Range of conduct to remove a delegate or assistant delegate is expanded to include "workplace violence" Expedited process to HA mediation and IC, no stalling

B. Safety and Health (new)

Appointment of consultant by the IC to investigate "specific violations." Rules established for consultant access and information. Consultant has authority to issue stop work order or close areas of hotel if there is a "clear and present danger --- due to the specific violations." Right to contest such order ("matter to be submitted and heard") within 24 hours at IC, even on weekends and holidays. Consultant shall issue written report which may also be contested at IC.

Other health and safety provisions:

Sufficient ventilation and average temperature and Employer to provide and maintain safety equipment, (e.g., respirators, goggles, etc.)

C. Conversion to Condominiums (new)

No prohibition, but payment of enhanced severance to affected employees who suffer a permanent loss of employment in exchange for a complete general release (16 days for each year of service).

D. Immigration

Notify Union in the event of a problem; provide unpaid leave to employee and reinstatement rights.

E. "Extra" Employees:

Expanded to include banquet cooks and banquet housekeeping attendants

Expanded to 15% (from 10%)

Expanded use of "extras" when there is a reduced work week

Expanded use of "extras" on days where 10% or more of classification has called out with less than 12 hours notice.

F. Layoff and Recalls

Written notice of recall to be provided to the Union weekly, for those recalled during the previous pay week. Two day limited recalls permitted under certain circumstances

G. Combination Jobs

Single day job combos permitted to cover where an employee fails to report as scheduled with no, or less than 12 hours, notice.

H. Overtime

"No employee shall receive overtime pay unless such work has been authorized or was performed with the actual or constructive knowledge of the Employer"

I. Hiring

Permanent job openings to be posted in Hotels; Union to be notified of each person hired and of job openings and cancellations.

J. Vacation Scheduling

Vacation scheduling – each calendar year, two deadlines for requests to be submitted in writing. Approvals subject to Hotel business demands.

K. Holidays

Washington's Birthday changed to President's Day

L. Uniforms, Employee Facilities and Supplies (new)

Uniforms to be appropriate for job; employee facilities to be safe, clean and sanitary; employees to be provided with supplies or equipment needed for their jobs. An Employer may not discontinue furnishing meals without negotiating with the Union.

M. Successors and Assigns

10 days notice (increased from 5); Owner to agree to Article 59

N. Schedule A

Added: Mini-bar Attendant, AV Technician; deleted: certain old titles.

O. Bankruptcy (new)

Notice to Union when Employer has knowledge of a filing that "would affect bargaining unit employees or the Agreement" and obligation to provide copies of filings and relevant info.

P. Electronic Information (new)

Employer agrees to transmit information in mutually agreed upon electronic format where available. Effective January 1, 2008, such information transmittals shall be in electronic format unless an Employer has a valid claim that to do so would be unreasonably or technologically infeasible.

Q. Translations (new)

Employer shall provide an individual capable of providing language assistance to "an employee who clearly needs language assistance or who cannot understand and requests language assistance" in discipline matters and shall make a good faith effort to do so in all other matters.

R. Union Training (new)

Each Delegate, Assistant Delegate and a reasonable number of such other employees as may be selected by the Union shall be granted two (2) days unpaid leave each year to attend Union training, provided that the Employer is provided with a minimum of ten (10) days advance written notice and further provided that the absence of such employee(s) shall not cause undue disruption to the operations of the Employer.

S. ITP Culinary Training (new)

Similar to banquet server training.

judicial interpretation of that term when it is found in other statutes.³²

Based on these cases one could argue that a neutrality agreement constitutes a thing of value. Indeed neutrality agreements almost always require the employer to provide at least four things that could be characterized by the courts as things of value: (1) access to the hotel's premises so the union can speak to the employees, (2) a list of employees (often with addresses), (3) a card-check provision, and (4) exclusivity to one union. If any of those are benefits that constitute a thing of value, the typical neutrality agreement would violate Section 302 of the LMRA.³³

Armed with these arguments, the employees of Heartland Industries, in Ohio, sought to have a neutrality agreement signed by their employer declared unlawful. These employees did not, however, prevail. In *Patterson v. Heartland Industrial Partners, LLP*,³⁴ the Northern District Court in Ohio, relying the Third Circuit's reasoning in *Hotel Employees Local 57 v. Sage Hospitality*,³⁵ ruled that the neutrality agreement was not a "thing of value" under Section 302 and accordingly granted defendants' summary judgment motion dismissing the action. The agreement at issue in that case provided that the employer would cooperate with the union during its organizing campaign by providing the union with employees' names and addresses and access to the workplace, and a pledge not to speak negatively about the union. The agreement also described terms of a first contract in the event that the union's campaign was successful.³⁶

³² Title 18 Section 201, Bribery of Public Officials and Witnesses (8 U.S.C. 201), defines two crimes, bribery and illegal gratuity. The bribery section prohibits giving or attempting to give anything of value to a government official with the intention of influencing their official actions, and reciprocally prohibits any public official from receiving or attempting to solicit any thing of value in return for official action. Title 18 Section 641, Public Money, Property or Records (18 U.S.C. 641), which prohibits embezzling, stealing, purloining, or knowingly converting any record, voucher, money, or thing of value of the United States or of any department of agency thereof, includes intangibles in its definition of "things of value." Title 18 Section 666, Theft or Bribery Concerning Programs Receiving Federal Funds (18 U.S.C. 666), makes it a crime to solicit or demand corruptly for the benefit of any person, or accept or agree to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of \$5,000 or more.

³³ In unrelated holdings, the courts have found the following to be things of value: promises of future employment, shares of stock with no commercial value, and the companionship of one's spouse or significant other during an overseas trip.

³⁴ 428 F. Supp. 2d 714 (ND Ohio 2006).

³⁵ 299 F. Supp 2d 461 (3rd cir.2004).

³⁶ The Court cited the Third Circuit's reasoning in *Hotel Employees Local 57 v. Sage Hospitality*, 3rd Cir. 299 F. Supp 2d 461 (2004), which it found persuasive: "The agreement here involves no payment, loan, or delivery of anything. The fact that a neutrality agreement—like any other labor

The *Patterson* case does not end the legal debate over neutrality agreements. For example, a case now before the National Labor Relations Board argues that card-check neutrality violates the law. There is a chance that this NLRB, made up of a majority of George W. Bush appointees, or the conservative-leaning Supreme Court could, in fact, make card-check neutrality agreements unlawful in the future. On the other hand, there is also a chance that, instead of being declared unlawful, card-checks could be mandated by law.

Competing Pending Federal Legislation on Card-check Recognition

Until March 2007 two competing bills were pending before Congress seeking to legislate opposing treatment of card-check recognition. The Secret Ballot Protection Act mandates an NLRB-supervised secret-ballot election in all union organizing campaigns,³⁷ while a competing bill championed by the AFL-CIO, the Employee Free Choice Act,³⁸ would require the board to certify a union as the bargaining representative through a card-check process. On March 2, 2007, the House of Representatives overwhelmingly passed the Employee Free Choice Act. If it were made law this act would require the National Labor Relations Board to recognize a union if a majority of the employees have signed authorization cards, would increase to triple pay the back pay owed to employees who were disciplined or discharged for trying to organize a union (from straight back pay), would impose fines of up to \$20,000 for certain willful or repeated unfair labor practices, and would require the unions and the

arbitration agreement—benefits both parties with efficiency and cost saving does not transform it into a payment or delivery of some benefit. Furthermore, any benefit to the union inherent in a more efficient resolution of recognition disputes does not constitute a thing of value within the meaning of the statute.”

³⁷ S. 1173, H.R. 874 (introduced by Senator Jim DeMint, along with five co-sponsors, and by Rep. Charlie Norwood and 91 House co-sponsors.

³⁸ S. 842, H.R. 1696 (introduced by Senator Edward Kennedy and 42 Senate co-sponsors, and Rep. George Miller and 215 House co-sponsors.

employers who cannot agree on a contract after 90 days of negotiations to submit their issues to what is referred to as “interest arbitration,” a process whereby an arbitrator decides the terms and conditions of employment. (Interest arbitration is required in many public-sector employment situations, but is rare in the private sector.)

We write about this act in conditional language, because the odds of this bill being enacted into law are slim. If the law passes the Senate, of which there is no guarantee, President Bush has promised to veto it. If, however, democrats remain in control of Congress and win the presidency in 2008, the chances are good that this bill or one like it will become law.

This bill can be viewed as repaying a debt to labor. In 1992 labor law reform was a major issue that a large part of President Clinton’s base wished to see enacted. The hot issue at the time was replacement workers. Under NLRB case law, employers may permanently replace economic strikers. Union leaders wanted that law changed. President Clinton could not, however, garner support for that change in his first two years as president, and after that he faced an antagonistic, Republican Congress. Labor law reform died.

In contrast, the Free Choice Act may gain enough votes in the near future. Certainly, the rhetoric is strong. A New York Times editorial argued that this law levels the playing field because employers were not only firing employees who were attempting to organize but were using other unfair and unlawful tactics. Often cited are the so-called “captive audience speeches,” where employers require employees to listen to the employer’s (antiunion) story. What has not been mentioned in that context is that employers cannot make promises nor can they confer benefits to employees during an organizing period. Unions, on the other hand, can promise employees higher wages, better benefits, and improved work rules. In addition, buying employees pizza and beer the night before the election is not only allowed, it is common. Because a union would be recognized as soon as it gains

The “Employee Free Choice Act” seeks to end the need for secret-ballot elections to recognize a union.

card signatures from a majority of employees, employers fear that unions will intimidate employees into signing cards.

Employers argue that this law will do far more than level the field because it will take away their right to tell their side of the story. In addition, because discrimination claims will be more expensive, employers may not be so quick to settle claims for 80 percent of back pay, as often occurs now, and may instead go to litigation—a much more expensive proposition.³⁹ Finally, interest arbitration seems a draconian measure to business owners. For an arbitrator to determine how much an employer pays its employees, establish what benefits it should offer, and decide what type of conduct is permitted at the company seems to usurp management’s purview. Finally, employers contend that it is hypocritical to label the bill “free choice” when it eliminates a secret-ballot (democratic) election process. Interestingly, a poll conducted by Zogby International in June 2004 of 704 randomly chosen union members living in the United States revealed that 66 percent of those polled disagreed it should be legal for a company and a union to sign a card-check agreement.⁴⁰

³⁹ Standard operating procedure is for the NLRB to allow the parties to settle for 80 percent.

⁴⁰ Results of the Poll may be reported at www.mackinac.org/article.aspx?ID=6806. The actual text of the question at issue is as follows: “Some companies and union organizers want to make a special agreement to unionize the workers if at least half of the workers sign their names on cards saying they want a union, rather than letting all the workers vote in a secret-ballot election overseen by the government. Do you agree or disagree that it should be legal for a company and union organizers to make this special agreement to bypass the normal secret-ballot process to determine whether to unionize the workers?” Twenty-six percent of those polled agreed with the statement and 8 percent were not sure.

This is not to say that the current system is by any means perfect or that it is fair. The reality is that the process of unions gaining recognition is governed by case law developed over 80 years that has often decided by National Labor Relations Boards that are political, by definition, because the members are appointed by the President of the United States to five-year terms. This means that at a certain point in each administration the president’s party constitutes a majority of the board members. Consequently, labor law often changes to comport with the views of the party in power. We submit that most management lawyers and labor relations professionals would support labor law reform that sought to establish fair elections. What management does not accept is that secret ballot elections are inherently unfair. Management scholars seeking to influence the course of legislation need to examine the findings used by the popular press and the sponsors of the bill and need to propose different reforms before the 2008 elections.

It seems unlikely that this law will pass anytime in the next two years, but the bets are off after that. Employers who wish to either stay nonunion or, at the very least, to give employees a choice, should begin to explain the positives and negatives of unionization now. Moreover, any management labor relations expert will emphatically state that the key to remaining nonunion is strong HR. Employers who wish to remain nonunion should invest in HR now.

Conclusion

Summer 2006 has passed and the union has declared victory. The Employee Free Choice Act is now pending and unions may be on the verge of comeback. Employers need to examine their strategy with existing and potential unions. ■

CHR Reports Index

www.chr.cornell.edu

2007 Reports

Vol. 7, No. 5 Enhancing Formal Interpersonal Skills Training through Post-Training Supplements by Michael J. Tews, Ph.D., and J. Bruce Tracey, Ph.D.

Vol. 7, No. 4 Brand Segmentation in the Hotel and Cruise Industries: Fact or Fiction?, by Michael Lynn, Ph.D.

Vol. 7, No. 3 The Effects on Perceived Restaurant Expensiveness of Tipping and Its Alternatives, by Shuo Wang and Michael Lynn, Ph.D.

Vol. 7, No. 2 Unlocking the Secrets of Customers' Choices, by Rohit Verma, Ph.D.

Vol. 7, No. 1 The Mixed Motive Instruction in Employment Discrimination Cases: What Employers Need to Know, by David Sherwyn, J.D., Steven Carvell, Ph.D., and Joseph Baumgarten, J.D.

2006 Reports

Vol. 6, No. 15 The Cost of Employee Turnover: When the Devil Is in the Details, by J. Bruce Tracey, Ph.D., and Timothy R. Hinkin, Ph.D.

Vol. 6, No. 14 An Examination of Guest Complaints and Complaint Communication Channels: The Medium Does Matter!, by Alex M. Susskind, Ph.D.

Vol. 6, No. 13 Using Your Pay System to Improve Employees' Performance: How You Pay Makes a Difference, by Michael C. Sturman, Ph.D.

Vol. 6, No. 12 Competitive Destination Planning: The Case of Costa Rica, by Zhaoping Liu, Sara Lo, Paula Vasconcellos, Judy A. Siguaw, D.B.A., and Cathy A. Enz, Ph.D.

Vol. 6, No. 11 A New Method for Measuring Housekeeping Performance Consistency, by Michael C. Sturman, Ph.D.

Vol. 6, No. 10 Intellectual Capital: A Key Driver of Hotel Performance, by Linda Canina, Ph.D., Cathy A. Enz, Ph.D., and Kate Walsh, Ph.D.

Vol. 6, No. 9 Mandatory Arbitration: Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims, by David Sherwyn, J.D.

Vol. 6, No. 8 Revenue Management in U.S. Hotels: 2001–2005, by Linda Canina, Ph.D., and Cathy A. Enz, Ph.D.

Vol. 6, No. 7 The Strategic Value of Information: A Manager's Guide to Profiting from Information Systems, by Gabriele Piccoli, Ph.D., and Paolo Torchio

Vol. 6, No. 6 Development and Use of a Web-based Tool to Measure the Costs of Employee Turnover: Preliminary Findings, by Timothy R. Hinkin, Ph.D., and J. Bruce Tracey, Ph.D.

Vol. 6, No. 5 Tipping and Its Alternatives: A Comparison of Tipping, Service Charges, and Service-inclusive Pricing, by Michael Lynn, Ph.D.

Vol. 6, No. 4 An Examination of Internet Intermediaries and Hotel Loyalty Programs: How Will Guests Get their Points?, by Bill Carroll, Ph.D., and Judy A. Siguaw, D.B.A.

Vol. 6, No. 3 Compendium 2006

Vol. 6, No. 2 Why Discounting Still Doesn't Work: A Hotel Pricing Update, by Linda Canina, Ph.D. and Cathy A. Enz, Ph.D.

Vol. 6, No. 1 Race Differences in Tipping: Questions and Answers for the Restaurant Industry, by Michael Lynn, Ph.D.

2006 Hospitality Tools

CHR Tool 8 A Comprehensive Guide to Merchandising Bed and Breakfast Inns, by William J. Carroll, Ph.D., Betsy Gomez, Anna Huen, Pamela Lanier, and Iris Lui

CHR Tool 7 A Picture Is Worth a Thousand Words: Using Photo-Elicitation to Solicit Hotel Guest Feedback, by Madeleine Pullman, Ph.D., and Stephani Robson

2006 Industry Perspectives

Industry Perspectives 1 The Power of Personal Service: Why It Matters • What Makes It Possible • How It Creates Competitive Advantage, by Barbara M. Talbott, Ph.D.

2005 Reports

Vol. 5, No. 13 Eight Rules for Competing in Hotel Real Estate Markets, by John Corgel, Ph.D.

2005 Reports (continued)

Vol. 5, No. 12 Biting Off More Than They Can Chew: Unfulfilled Development Commitments in International Master Franchising Ventures, by Arturs Kalnins, Ph.D.

Vol. 5, No. 11 The Agglomeration Conundrum: How Co-location Helps Some Hotels and Hurts Others, by Cathy A. Enz, Ph.D., Linda Canina, Ph.D., and Jeffrey Harrison, Ph.D.

Vol. 5, No. 10 Low-price Guarantees: How Hotel Companies Can Get It Right, by Steven A. Carvell, Ph.D., and Daniel C. Quan, Ph.D.

Vol. 5, No. 9 Dining Duration and Customer Satisfaction, by Breffni Noone, Ph.D. and Sheryl E. Kimes, Ph.D.

Vol. 5, No. 8 Quantifying Impact: The Effect of New Hotels and Brand Conversions on Revenues of Existing Hotels, by Arturs Kalnins, Ph.D.

Vol. 5, No. 7 Best-available-rate Pricing at Hotels: A Study of Customer Perceptions and Reactions, by Kristin V. Rohlfs and Sheryl E. Kimes, Ph.D.

Vol. 5, No. 6 An Examination of Revenue Management in Relation to Hotels' Pricing Strategies, by Cathy A. Enz, Ph.D. and Linda Canina, Ph.D.

Vol. 5, No. 5 Information System Design: A Systematic Way to Analyze IT in Your Business, by Erica L. Wagner, Ph.D., Gabriele Piccoli, Ph.D., and Sharon Louthen.

Vol. 5, No. 4 Perceived Fairness of Restaurant Waitlist-management Policies, by Kelly A. McGuire and Sheryl E. Kimes, Ph.D.

Vol. 5, No. 3 Compendium 2005

Vol. 5, No. 2 Why Customers Shop Around: A Comparison of Hotel Room Rates and Availability across Booking Channels, by Gary M. Thompson, Ph.D. and Alexandra Failmezger

Vol. 5, No. 1 Retaining Management Talent: What Hospitality Professionals Want from Their Jobs, by Masako S. Taylor and Kate Walsh, Ph.D.

2004 Reports

Vol. 4, No. 9 Making IT Matter: A Manager's Guide to Creating and Sustaining Competitive Advantage with Information Systems, by Gabriele Piccoli, Ph.D.

Vol. 4, No. 7 Why Discounting Doesn't Work: The Dynamics of Rising Occupancy and Falling Revenue among Competitors, by Cathy A. Enz, Ph.D., Linda Canina, Ph.D., and Mark Lomanno

Vol. 4, No. 6 Workforce Scheduling: A Guide for the Hospitality Industry, by Gary M. Thompson, Ph.D.

Vol. 4, No. 5 Increasing Servers' Tips, by W. Michael Lynn, Ph.D.

Vol. 4, No. 4 Hotel Managers' Perceptions of the Blackout of '03, by Robert J. Kwortnik, Ph.D.

Vol. 4, No. 3 Compendium 2004

Vol. 4, No. 2 Restaurant Revenue Management, by Sheryl Kimes, Ph.D.

Vol. 4, No. 1 Understanding Switchers and Stayers in the Lodging Industry, by Iselin Skogland and Judy Siguaw, Ph.D.

2003 Reports

Vol. 3, No. 5 Evolution in Electronic Distribution: Effects on Hotels and Intermediaries, by Bill Carroll, Ph.D. and Judy Siguaw, Ph.D.

Vol. 3, No. 4 Key Issues of Concern for Food-service Managers, by Cathy A. Enz, Ph.D.

Vol. 3, No. 3 Lodging Demand for Urban Hotels in Major Metropolitan Markets, by Linda Canina, Ph.D., and Steve Carvell, Ph.D.

Changes in U.S. Hotel Safety and Security Staffing and Procedures during 2001 and 2002, by Cathy A. Enz, Ph.D.

Dedicated or Combinable? A Simulation to Determine Optimal Restaurant Table Configuration, by Gary M. Thompson, Ph.D.

Compendium 2003

2002 Reports

Multitunit Restaurant-productivity Assessment: A Test of Data-envelopment Analysis, by Dennis Reynolds, Ph.D., and Gary M. Thompson, Ph.D.



www.chr.cornell.edu